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No. 82-1850

IN THE SUPREME COURT OF THE UNITED STATES

October, 1982 TERM

STATE OF MINNESOTA by WASHINGTON WILDLIFE PRESERVATION, INC., and CHARLES PETERSON, as its President, et al.,

Petitioners,

vs.

STATE OF MINNESOTA and its DEPARTMENT OF NATURAL RESOURCES, et al.,

Respondents.

ON WRIT OF CERTIORARI

TO THE MINNESOTA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

AND APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

Did the Supreme Court of the State of Minnesota err in holding that an Interstate Commerce Commission issuance of an abandonment certificate for a railroad right-of-way did not constitute an abandonment of the underlying easement and trigger reversion of the fee to the abutting landowners, and further err in holding that the State of Minnesota could lawfully purchase from the railroad the right-of-way for use as a recreational trail, where the purchase was made beyond the time limitations designated by the Interstate Commerce Commission for public use sale?

Did the Supreme Court of the State of Minnesota err in holding that the State of Minnesota's purchase of an abandoned railroad right-of-way from a railroad and conversion of that right-of-way into a recreational trail constituted a continued use of an easement for public travel, and further

err in refusing to hold that this purchase and conversion was in derogation of the abutting landowners' constitutional rights under the 5th and 14th Amendment to the United States Constitution?

TABLE OF CONTENTS

	Page
Questions Presented for Review	(i)
Table of Contents	(iii)
Table of Authorities	(vi)
Citation to Lower Court Decisions	(viii)
Jurisdictional Statement	1
Text of Constitutional and Statutory Provisions	2
Statement of the Case	11
Argument	21

I.

The Supreme Court of the State of Minnesota erred in holding that an Interstate Commerce Commission issuance of an abandonment certificate for a railroad right-of-way did not constitute an abandonment of the underlying easement and trigger reversion of the fee to the abutting landowners, and further erred in holding that the State of Minnesota could lawfully purchase from the railroad the right-of-way for use as a recreational trail, where the purchase was made beyond the time limitations designated by the Interstate Commerce Commission for sale for public use.

Page

Argument

II. 29

The Supreme Court of the State of Minnesota erred in holding that the State of Minnesota's purchase of an abandoned railroad right-of-way from a railroad and conversion of the right-of-way into a recreational trail constituted a continued use of an easement for public travel, and further erred in refusing to hold that this purchase and conversion was in derogation of the abutting landowners' constitutional rights under the Fifth and Fourteenth Amendments to the United States Constitution.

Conclusion 36

Appendix

A. Decision of Minnesota Supreme Court, State of Minnesota by Washington Wildlife Preservation, Inc. et al. v. State of Minnesota, et al., 329 N.W.2d 543 (Minn. 1983) 1

B. Memorandum and Order of District Court, State of Minnesota by Washington

Wildlife Preservation, Inc. et al. v. State of Minnesota, et al., dated November 4, 1981.

TABLE OF AUTHORITIES

	Pages
United States Supreme Court	
Chicago and North Western Transportation Company v. Kalo Brick and Tile Co., 450 U.S. 311 (1981)	26, 27
Federal Courts of Appeal	
Hayfield Northern Railroad Company, Inc. v. Chicago and Northwestern Transportation Company, 693 F.2d 819 (8th Cir. 1982)	27, 28
State Supreme Courts	
Adams v. Chicago and B & N. R. Co., 39 Minn. 286, 39 N.W. 629 (1888)	33
Chambers v. Great Northern Power Company, 100 Minn. 214, 110 N.W. 1128 (1907)	33
City Motel, Inc. et al. v. Nevada Department of Highways, 75 Nev. 137, 336 P.2d 375 (1959)	14, 32, 33
Pollnow v. Wisconsin Department of Natural Resources, 88 Wis. 350, 276 N.W.2d 738 (1979)	14, 32
Schnabel v. County of DuPage, 101 Ill. App. 3d 553, 428 N.E.2d 678 (1981)	14, 32

	Pages
Washington Wildlife et al. v. State of Minnesota, et al., 329 N.W.2d 543 (Minn. 1983)	14, 15, 17, 20, 21, 28, 30, 31, 34, 36
Federal Constitutional Authority	
United States Constitution, Amendment 5	2, 14, 31, 34
United States Constitution, Amendment 14	3, 14, 31
Federal Statutory Authority	
49 U.S.C. §10905	3, 22, 28
49 U.S.C. §10906	10, 11, 13, 14, 22, 25, 29
Minnesota Statutory Authority	
Minn. Stat. § 84.029, subd. 2	11, 35, 36

CITATIONS TO LOWER COURT DECISIONS

1. Minnesota Supreme Court.

State of Minnesota, by Washington Wildlife Preservation, Inc., et al., Appellants (82-150), Respondents (82-151), v. State of Minnesota and its Department of Natural Resources, et al., Respondents (82-150), Appellants (82-151), 329 N.W.2d 543 (Minn. 1983).

2. Washington County District Court.

State of Minnesota by Washington Wildlife Preservation, Inc., and Charles Peterson, as its President, and Washington Wildlife Preservation, Inc., and Charles Peterson, as its President; and Edward and Dorothy Reid, Betty Thorson, Kenneth Wharton, Jr., Paul Schultz, Victor Witzel, Richard Firkus, Stanley Jakubowski, Patrick Sweeny, Marlin Eiklenborg, Charles Peterson, Verlin Behm, Agnes and James Lane, Johnson Associates, William Johnson and Thomas Johnson, all of whom reside or own property in Grant Township; and Visvaldis Vanags, William Olson, Jr., Ronald and Marlene Tatro, Bruce Rollie, Richard and Nancy Butter, Kenneth Berwald and Berwald Investment, all of whom reside or own property in Stillwater Township; and G.N.S. Investors, and John Kokkeler, all of whom reside or own property in the City of White Bear Lake; All in Washington County, Minnesota, Plaintiffs, vs. State of Minnesota and

its Department of Natural Resoures, and Commissioner Joseph Alexander, and its Department of Administration, and Commissioner James J. Hiniker, Jr., and the Soo Line Railroad Company, Defendants.

Memorandum and Order, dated November 4, 1981, Washington County District Court, File No. 50613.

JURISDICTION

This is an appeal from the final judgment of the Minnesota Supreme Court rendered on January 14, 1983 and entered on February 3, 1983. Jurisdiction is conferred upon the United States Supreme Court by 28 U.S.C. §1257(3). The grounds upon which the jurisdiction of this Court is invoked are threefold:

1. The Minnesota Supreme Court has interpreted a federal statute in a manner repugnant to the United States Constitution.

2. The Minnesota Supreme Court has interpreted a state statute in a manner which is repugnant to the United States Constitution.

3. The Minnesota Supreme Court has interpreted a state statute in a manner repugnant to and in conflict with federal law on the same subject matter.

Under 28 U.S.C. §1257(3), a final

judgment rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of either a statute of the United States or of a State is drawn in question on the ground of its being repugnant to the Constitution, or where the validity of a state statute is drawn in question as being repugnant to the laws of the United States. All three of these situations are presented in this appeal.

TEXT OF CONSTITUTIONAL AND STATUTORY PROVISIONS

The following are the relevant constitutional and statutory provisions applicable to this appeal, stated verbatim as required by Supreme Court Rule 21.1(f):

> United States Constitution, Amendment Five
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in

actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment Fourteen, Section One

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

49 U.S.C. §10905.

(a) In this section --

(1) "avoidable cost" means all expenses that would be incurred by a rail carrier in providing transportation that would not be incurred if the railroad line over which the transportation was provided were abandoned or if the transportation were discontinued. Expenses include cash inflows foregone and cash outflows incurred by the rail carrier as a

result of not abandoning or discontinuing the transportation. Cash inflows foregone and cash outflows incurred include --

(A) working capital and required capital expenditure;

(B) expenditures to eliminate deferred maintenance;

(C) the current cost of freight cars, locomotives, and other equipment; and

(D) the foregone tax benefits from not retiring properties from rail service and other effects of applicable Federal and State income taxes.

(2) "reasonable return" means --

(A) if a rail carrier is not in reorganization, the cost of capital to the rail carrier, as determined by the Interstate Commerce Commission; and

(B) if a rail carrier is in reorganization, the mean cost of capital of rail carriers not in reorganization, as determined by the Commission.

(b) Any rail carrier which has filed an application for a certificate of abandonment or discontinuance shall provide promptly to a party considering an offer of financial assistance and shall provide

concurrently to the Commission --

> (1) an estimate of the annual subsidy and minimum purchase price required to keep the line or a portion of the line in operation;
>
> (2) its most recent reports on the physical condition of that part of the railroad line involved in the proposed abandonment or discontinuance;
>
> (3) traffic, revenue, and other data necessary to determine the amount of annual financial assistance which would be required to continue rail transportation over that part of the railroad line; and
>
> (4) any other information that the Commission may deem necessary to allow a potential offeror to calculate an adequate subsidy or purchase offer.

(c) When the Commission finds under section 10903 of this title [49 USCS §10903] that the public convenience and necessity require or permit abandonment or discontinuance of a particular railroad line, it shall, concurrently with service of the decision upon the parties, publish the finding in the Federal Register. Within 10 days following the publication, any person may offer to pay the carrier a subsidy or offer to purchase the line. Such offer shall be filed concurrently with the Commission. If the offer to subsidize or purchase the line is less than the

carrier's estimate provided under subsection (b)(1) of this section, the offer shall explain the basis of the disparity, and the manner in which the offer of subsidy or purchase is calculated.

(d) If, within 15 days after the publication required in subsection (c) of this section, the Commission finds that --

(1) a financially responsible person (including a government authority) has offered financial assistance to enable the rail transportation to be continued over that part of the railroad line to be abandoned or over which all rail transportation is to be discontinued; and

(2) it is likely that the assistance would be equal to --

(A) the difference between the revenues attributable to that part of the railroad line and the avoidable cost of providing rail freight transportation on the line, plus a reasonable return on the value of the line; or

(B) the acquisition cost of that part of the railroad line;

the Commission shall postpone the issuance of a certificate authorizing abandonment or discontinuance in accordance with subsections (e) and (f) of this section.

(e) If the carrier and a person offering financial assistance enter into an agreement which will provide continued rail service, the Commission shall postpone the issuance of the certificate for so long as the agreement, or an extension or modification of the agreement, is in effect. If the carrier and a person offering to purchase a line enter into an agreement which will provide continued rail service, the Commission shall approve the transaction and dismiss the application for abandonment or discontinuance. If the carrier and a financially responsible person (including a government authority) fail to agree on the amount or terms of the subsidy or purchase, either party may, within 30 days after the offer is made, request that the Commission establish the conditions and amount of compensation. If no agreement is reached within 30 days after the offer is made and neither party requests that the Commission establish the conditions and amount of compensation during that same period, the Commission shall immediately issue a certificate authorizing the abandonment or discontinuance.

(f) (1) Whenever the Commission is requested to establish the conditions and amount of compensation under this section --

(A) the Commission shall render its decision within 60 days;

(B) where subsidy has been offered, the Commission

shall determine the amount and terms of subsidy based on the avoidable cost of providing continued rail transportation, plus a reasonable return on the value of the line; and

(C) where an offer of purchase has been made in order to continue rail service on the line, the Commission shall determine the price and other terms of sale. In no case shall the Commission set a price which is below the fair market value of the line (including, unless otherwise mutually agreed, all facilities on the line or portion necessary to provide effective transportation services).

(2) The decision of the Commission shall be binding on both parties, except that the person who has offered to subsidize or purchase the line may withdraw his offer within 10 days of the Commission's decision. In such a case, the Commission shall immediately issue a certificate authorizing the abandonment or discontinuance, unless other offers are being considered pursuant to paragraph (3) of this subsection.

(3) If a carrier receives more than one offer to purchase or subsidize, it shall select the offeror with whom it wishes to

transact business, and complete the sale or subsidy agreement, or request that the Commission establish the conditions and amount of compensation prior to the 40th day after the date on which notice was published under subsection (c) of this section. If no agreement on subsidy or sale is reached within the 40-day period and the commission has not been requested to establish the conditions and amount of compensation, any other offeror may request that the Commission establish the conditions and amount of compensation. If the Commission has established the conditions and amount of compensation and the original offer has been withdrawn, any other offeror may accept the Commission's decision within 20 days of such decision, and the Commission shall require the carrier to enter into a sale or subsidy agreement with such offeror, if such sale or agreement incorporates the Commission's decision.

(4) No purchaser of a line or portion of line sold under this section may transfer or discontinue service on such line prior to the end of the second year after consummation of the sale, nor may such purchaser transfer such line, except to the carrier from whom it was purchased, prior to the end of the fifth year after consummation of the sale.

(5) Any subsidy provided under

this section may be discontinued on notice of 60 days. Unless, within such 60-day period, another financially responsible party enters into a subsidy agreement at least as beneficial to the carrier as that which was or was to be discontinued, the Commission shall, at the carrier's request, immediately issue a certificate authorizing the abandonment or discontinuance of service on the line.

(as amended Oct. 14, 1980, P.L. 96-448, Title IV, §402(c), 94 Stat. 1942.)

49 U.S.C. Section 10906.

When the Interstate Commerce Commission finds under section 10903 of this title [49 USC § 10903] that the present or future public convenience and necessity require or permit abandonment or discontinuance, the Commission shall find further whether the rail properties that are involved in the proposed abandonment or discontinuance are suitable for use for public purposes, including highways, other forms of mass transportation, conservation, energy production or transmission, or recreation. If the Commission finds that the rail properties proposed to be abandoned are suitable for public purposes, the properties may be sold, leased, exchanged, or otherwise disposed of only under conditions provided in the order of the Commission. The conditions may include a prohibition on any such disposal for a period of not more than 180 days after

the effective date of the order, unless the properties have first been offered, on reasonable terms, for sale for public purposes.

Minnesota Statutes Section 84.029, subd. 2

The commissioner may acquire, by gift, purchase, or lease, easements or other *interests in land for trails*, and recreational uses related to trails, where necessary to complete trails established primarily in state forests, state parks, or other public land under the jurisdiction of the commissioner, when railroad right-of-ways are abandoned, when the use of township roads is compatible with vehicular travel, and when needed to complete trails established by the legislature.

STATEMENT OF THE CASE

A. Introduction.

The Minnesota Supreme Court held on January 14, 1983, that a railroad right-of-way, certified as abandoned by the Interstate Commerce Commission pursuant to 49 U.S.C. §10906, may lawfully be purchased by the State Department of Natural Resources for use as a recreational trail without violating the reversionary rights of homeowners along the abandoned railroad

right-of-way. Petitioners are homeowners along the abandoned railroad right-of-way who contended, inter alia, in the State District Court and in the Minnesota Supreme Court that the conversion of an abandoned railroad right-of-way to a recreational trail, without the recognition of their lawful reversionary rights in the right-of-way now abandoned for railroad purposes, would constitute a taking without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution, and would also violate the federal Interstate Commerce Commission Statute respecting new public uses for abandoned railroad right-of-ways, 49 U.S.C.

§10906.[1]

The trial court held that in those segments of the right-of-way found to be easements, the homeowners' reversionary rights were activated automatically upon the railroad's abandonment of the right-of-way. Memorandum in Support of Order at 11. The Minnesota Supreme Court reversed, holding that no abandonment of the public use was caused by the transfer of the use of the right-of-way from railroad purposes to recreational purposes, and therefore, no reversionary rights were

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[1]These arguments were raised in the trial court in Plaintiffs' Memorandum in Support of Motion for Summary Judgment at 23-28 and in Plaintiffs' Reply Memorandum in Support of Motion for Summary Judgment at 13-22. These arguments were raised before the Minnesota Supreme Court in Plaintiffs'-Respondents' Brief For Appeal Number 82-151 at 1-16, Plaintiffs'-Appellants' Reply Brief For Appeal Number 82-150 at 11, and Appellants' Brief in Response to the Amicus Curiae Brief of the Minnesota Parks Foundation at 4-9.

yet at stake. Washington Wildlife Preservation Inc. v. State of Minnesota, 329 N.W.2d 543, 548 (Minn. 1983).

The decision places the Minnesota Supreme Court in direct conflict with both the authority conferred upon the Interstate Commerce Commission by act of Congress under 49 U.S.C. §10906 and the federal constitutional prohibitions against taking of property without just compensation. United States Constitution, Amend. 5, 14.

The Minnesota Supreme Court decision also conflicts with appellate court decisions of other states that have also contrasted the reversionary rights of homeowners with changes in the public use of abandoned railroad right-of-ways. Pollnow v. Wisconsin Department of Natural Resources, 88 Wis. 350, 276 N.W.2d 738 (1979); City Motel, Inc. et al. v. Nevada Department of Highways, 75 Nev. 137, 336 P.2d 375 (1959); Schnable v. County of

DuPage, 101 Ill. App. 3d 553, 428 N.E.2d 671 (1981).

The Washington Wildlife appeal merits the attention of the United States Supreme Court for two reasons. First, the conflict between the various state jurisdictions over the extent of the rights of the government in an abandoned railroad right-of-way presents serious inconsistencies over the interpretation of the Fifth Amendment of the United States' Constitution and the Interstate Commerce Commission Act regulating the abandonment of railroad right-of-ways. Second, the Washington Wildlife holding represents a serious challenge to the jurisdiction of the ICC over railroad abandonments, which conflict has national significance for the future of railroad abandonments in the United States and the lawful conversion of these railroad right-of-ways to other public purposes.

A decision of this nation's highest Court is necessary to resolve these conflicts by establishing both the authority of the ICC over regulation of railroad abandonments and the extent of the public interest in railroad right-of-ways consistent with the Fifth and Fourteenth Amendments.

B. STATEMENT OF FACTS

Washington Wildlife Preservation, Inc. ("Washington Wildlife") is a Minnesota non-profit corporation[2] composed of residents of Washington County in the State of Minnesota whose property is traversed by an abandoned railroad right-of-way. Exhibits AA and KK, attached to Affidavit of Becky A. Comstock, dated June 12, 1981 (hereinafter referred to as "Comstock Affidavit"). Washington Wildlife was

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[2]Washington Wildlife Preservation Inc. has no parent company, subsidiary or affiliate.

formed for the principal purpose of ensuring that the abandoned right-of-way reverts to the members of Washington Wildlife, the rightful owners of the abandoned strip.

The railroad right-of-way in question was owned as an easement by the Soo Line Railroad and used for railroad purposes until October 7, 1977.[3] The Interstate Commerce Commission officially certified the right-of-way as abandoned on January 23, 1980. Affidavit of Stanley M. Mrosak, par. 4, dated March 18, 1981. By Quit Claim Deed, dated August 22, 1980, the Railroad sold whatever interest it had in the now abandoned right-of-way to the State

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[3]We note that the question of whether or not the railroad held fee title or an easement in the right-of-way was in conflict between the parties. The Minnesota Supreme Court, however, assumed the right of way to be only an easement for purposes of its decision. 329 N.W.2d at 546.

of Minnesota Department of Natural Resources.

On October 14, 1980, Washington Wildlife brought a Declaratory Judgment action in the District Court in Washington County, Minnesota, to have the purchase of the right-of-way declared null and void. Cross motions for summary judgment were brought before the District Court by Washington Wildlife and the State of Minnesota. The District Court granted a partial summary judgment in favor of both parties, finding that the railroad held fee title to most of the right-of-way and that abandonment did not create a reversion of the right-of-way with respect to those parcels, but also held the sale of the right-of-way to the state null and void with respect to the parcels determined to be easements. The parcels determined to be easements were held by the District Court to revert automatically as a matter of law

to the adjoining landowners.

Both parties appealed from this decision to the Minnesota Supreme Court. Washington Wildlife appealed to have the parcels which were declared fee simple by the District Court declared easements by the Minnesota Supreme Court (Appeal No. 82-150.) The State of Minnesota cross appealed to have those easements held to revert by the District Court declared fee title and nonreversionary (Appeal No. 82-151).[4] Both parties thoroughly briefed and argued the questions of the continuation of the public use in the right-of-way and the authority of the ICC to declare the right-of-way abandoned before the District Court and the Minnesota Supreme Court. Oral argument was had

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[4]In addition, the Minnesota Parks Foundation appeared and filed a brief before the Minnesota Supreme Court as amicus Curiae on behalf of the State of Minnesota.

before the Minnesota Supreme Court sitting en banc on October 6, 1982.

The Minnesota Supreme Court rendered its decision on January 14, 1983, reversing the District Court's granting of Partial Summary Judgment in favor of Washington Wildlife and holding that, assuming the interest of Washington Wildlife in the right-of-way to be an easement and not fee title, the right-of-way would nevertheless not revert to the members of Washington Wildlife. The Minnesota Supreme Court held that the issuance of an ICC order for abandonment was not an abandonment of the right-of-way for all public purposes and that the State could lawfully purchase the right-of-way from the railroad for use as a recreational trail outside of the time

limits in the ICC order. 329 N.W.2d 543, 546-48.

ARGUMENT

I.

The Supreme Court of the State of Minnesota erred in holding that an Interstate Commerce Commission issuance of an abandonment certificate for a railroad right-of-way did not constitute an abandonment of the underlying easement and trigger reversion of the fee to the abutting landowners and further erred in holding that the State of Minnesota could lawfully purchase from the railroad the right-of-way for use as a recreational trail, where the purchase was made beyond the time limitations designated by the Interstate Commerce Commission for sale for public use.

On January 23, 1980, the Interstate Commerce Commission ("ICC") order of October 7, 1977 became effective and the railroad right-of-way in question herein was officially declared abandoned by the ICC.

By law Congress authorized the ICC to take two actions with respect to an Order for Abandonment of a railroad right-of-way. If the ICC found that the right-of-way was

suitable for continued rail operations, it could postpone an abandonment for 180 days pending negotiation between a prospective purchaser of the right-of-way for continued rail operations and the railroad holding the right-of-way. 40 U.S.C. §10905.

Congress also authorized the ICC to order an abandonment of the right-of-way and extend for a maximum of 180 days following abandonment, a period of time to allow the property to be purchased for public purposes other than continued rail operations. 49 U.S.C. §10906.

The ICC, in its Order of January 23, 1980, acted pursuant to the authority granted by both 49 U.S.C. §§10905 and 10906. The relevant parts of its Order read as follows:

> 3. That with respect to that segment of the line under negotiation for continued rail service between Soo Line Railroad Company and Burlington Northern, Inc., Burlington Northern shall have the first right of refusal prior to the offer of the line of

railroad for public use, as described above.

4. That with respect to the remaining portion of the line, the Soo Line shall not sell, lease, exchange or otherwise dispose of the property along that portion of the above-described line of railroad for a period of 180 days, commencing with the effective date of this certificate and order prescribed in the eighth ordering paragraph below, unless a binding agreement for the use of the properties has been negotiated between the Soo Line Railroad Company and the Minnesota Department of Natural Resources, or unless otherwise ordered by this Commission.

. . . .

8. That only to the extent this certificate and order is applicable to the portion of the line under negotiation for continued rail service, the above effective date shall be postponed for a period of six months to allow the parties time to negotiate and enter into an agreement as provided in section 1(a)(6) of the Interstate Commerce Act; provided, that in order for any proposal to be consummated the appropriate application under the Interstate Commerce Act is filed, and approved by the Commission.

See Exhibit B attached to the Affidavit of Stanley Mrosak, dated March 18, 1981. (emphasis added).

As paragraph eight of the ICC Order states, the abandonment of the railroad right-of-way was postponed only with respect to the proposed acquisition of the right-of-way by the Burlington Northern, Inc. for continued rail operations.

On January 2, 1979, the ICC extended the time for effectuating the sale of the right-of-way to Burlington Northern, Inc. for continued rail operations to January 23, 1980. When no purchase was consummated by Burlington Northern, Inc. on January 23, 1980, the abandonment of the right-of-way was complete and the 180 day negotiation period for the Minnesota Department of Natural Resources began. The 180 day period expired on July 21, 1980, without a purchase by the Minnesota Department of Natural Resources.

The Minnesota Department of Natural Resources signed a purchase agreement and received a quit claim deed on August 20,

1980. Affidavit of Stanley M. Mrosak dated March 18, 1981, par. 9. It is uncontested that this purchase took place outside of the 180 day period granted by the ICC Order and authorized by Congress.

The provision of the law relating to sale of the right-of-way for other public purposes is clear on its face.

> "the properties may be sold . . . only under conditions provided in the order of the Commission. The conditions may include a prohibition on any such disposal for a period of not more than 180 days after the effective date of the order . . . "

49 U.S.C. §10906. By the terms of paragraph four of the ICC Order of October 7, 1977, "a binding agreement for the use of the properties" must have been negotiated within the 180 day period following abandonment.

Washington Wildlife, in a brief to the Minnesota Supreme Court, argued that "while this 180-delay was provided for in the ICC Order, this delay only amounted to a right

of first refusal given to DNR to purchase the abandoned right-of-way. The 180 day period did not prevent the abandonment from taking place. . . . Thus, the federal statutes make clear that although the ICC can postpone abandonment while means of continuing rail service are explored, it cannot postpone formal abandonment to negotiate a sale of the right-of-way for recreational purposes."

Plaintiffs'-Respondents' Brief For Appeal Number 82-151, pp. 3-4.

The Minnesota Supreme Court had no authority to extend the time for purchase or delay abandonment beyond the 180 day period authorized by Congress and ordered by the ICC. It is a direct challenge to the exclusive jurisdiction granted the ICC over the railroad abandonment by Congress and is therefore contrary to federal law. Chicago and North Western Transportation Co. v. Kalo Brick and Tile Co., 450 U.S.

311 (1981). If this decision is allowed to stand, a State Supreme Court will have decided a significant federal question in contravention to the letter of the law and the Order of the ICC.

The United States Supreme Court has held that the ICC has exclusive jurisdiction over railroad abandonments.

> ". . . the construction of the applicable federal law is straightforward and unambiguous. Congress granted to the Commission plenary authority to regulate, in the interest of interstate commerce, rail carriers' cessations of service on their lines. And at least as to abandonments, the authority is exclusive." (emphasis added.)

Chicago and Northwestern Transportation Company v. Kalo Brick and Tile Company, 450 U.S. 311, 323 (1981).

A case presenting similar (although not identical) issues is currently pending before the United State Supreme Court on a Petition for Writ of Certiorari arising out of a decision of the Eighth Circuit Court of Appeals. Hayfield Northern Railroad

Company, Inc. v. Chicago and Northwestern Transportation Company, 693 F.2d 819 (8th Cir. 1982). Hayfield also represents a conflict over the jurisdiction of the ICC over railroad abandonments and state law attempts to encroach upon that jurisdiction. In Hayfield, the Eighth Circuit, relying upon Kalo, supra, held that the ICC had exclusive authority to regulate abandonments of railroad right-of-ways and that an attempt to acquire a railroad right-of-way declared abandoned by the ICC by using the power of eminent domain under state law was an unlawful encroachment upon that exclusive jurisdiction.

Washington Wildlife represents the other half of the Hayfield problem. Where Hayfield concerns the jurisdiction of the ICC over future continuation of railroad right-of-ways for railroad purposes under 40 U.S.C. §10905, Washington Wildlife presents the question of the jurisdiction

of the ICC over future continuation of railroad right-of-ways for other public purposes under 49 U.S.C. §10906. A decision of the United State Supreme Court is necessary to provide a uniform interpretation of authority of the ICC over the regulation of abandoned railroad right-of-ways.

II.

The Supreme Court of the State of Minnesota erred in holding that the State of Minnesota's purchase of an abandoned railroad right-of-way from a railroad and conversion of the right-of-way into a recreational trail constituted a continued use of an easement for public travel and further erred in refusing to hold that this purchase and conversion was in derogation of the abutting landowners' constitutional rights under the Fifth and Fourteenth Amendments to the United States' Constitution.

Washington Wildlife vigorously maintained before the Minnesota Supreme Court that the railroad right-of-way declared abandoned by ICC order could not lawfully be purchased by the State of Minnesota from

the railroad for use as a recreational trail.[5] Once abandoned for railroad purposes, the right-of-way must revert to the homeowners whose property abuts the right-of-way. The fact of a reversionary interest of homeowners in abandoned railroad right-of-ways was assumed by the Minnesota Supreme Court. 329 N.W.2d at 546. The question presented for review was whether or not the right-of-way was abandoned so as to trigger the homeowners' reversionary interests.

The question of abandonment is necessarily intertwined with federal constitutional questions. The extent of the right of the public to use a railroad right-of-way for the different public

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[5] See Plaintiffs'-Respondents' Brief for Appeal Number 82-151 at pp. 1-16, Plaintiffs'-Appellants' Reply Brief for Appeal Number 82-150 at p. 11, and Appellants' Brief in Response to the Amicus Curiae Brief of the Minnesota Parks Foundation, at pp. 4-9.

purpose of a recreational trail is necessarily limited by the Fifth Amendment's prohibition against taking of property without just compensation (as applied to the states through the Fourteenth Amendment).

The Minnesota Supreme Court held that no abandonment of the railroad right-of-way occurred "for all purposes of public travel". Washington Wildlife, supra, 329 N.W.2d at 548. Therefore, no taking occurred under the federal Constitution when the right-of-way was sold to the State by the railroad, for use as a recreational trail.

The decision is in marked contrast to the decisions of three other state appellate courts which have held that a cessation of use of a railroad right-of-way for railroad purposes constitutes an abandonment of the right to use the easement and triggers an automatic reversion to

the adjoining landowners. Pollnow v. Wisconsin Department of Natural Resources, 88 Wis. 350, 276 N.W.2d 738 (1979); City Motel, Inc. et al v. Nevada Department of Highways, 75 Nev. 137, 336 P.2d 375 (1959); Schnabel v. County of DuPage, 101 Ill. App. 3d 553, 428 N.E.2d 671 (1981). Pollnow and Schnabel, supra, dealt directly with the question of a change in public use of the right-of-way from rail operations to recreational trails. Both appellate courts found the change in use unlawful and ordered reversion of the right-of-way to the adjoining landowners. City Motel, supra, concerned a change in use of a right-of-way from rail operations to a public highway. The Nevada Supreme Court found this too to be an unlawful change in use of the right-of-way.

The Minnesota Supreme Court itself has held that abandonment of a railraod right-of-way for railroad purpose triggers

an automatic reversionary right in the adjoining landowners. Chambers v. Great Northern Power Company, 100 Minn. 214, 110 N.W. 1128 (1907). The Minnesota Supreme Court has also held that the use to which a right-of-way originally acquired for street purposes can be put cannot constitutionally be changed.

> "The conclusions arrived at are . . . that depriving him of or interfering with his enjoyment of the easement for any public use not a proper street use is a taking of his property within the meaning of the constitution . . . "

Adams v. Chicago and B. and N. R. Co., 39 Minn. 286, 39 N.W. 629 (1888).[6] Thus, the Washington Wildlife decision contradicts past holdings of the Minnesota Supreme Court on the constitutional questions involved as well as the decisions of appellate courts of other jurisdictions.

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[6]Cited to the Minnesota Supreme Court in Plaintiffs'-Respondents' Brief For Appeal Number 82-151, p. 15.

A uniform interpretation of the extent of the rights of the public in abandoned railroad right-of-ways within the confines of the federal Constitution necessitates United States Supreme Court review. Inconsistent interpretations of the extent of Fifth Amendment protection to homeowners with reversionary interests in right-of-ways favors the homeowners of several states over the homeowners of the State of Minnesota. A United States Supreme Court decision would eliminate that favoritism.

This appeal does not present the question of whether conversion of right-of-ways to recreational trails is desireable or not desireable from a public policy standpoint. Rather, it presents the question of how the right-of-way should be acquired by the state for recreational purposes, consistent with federal law and the United States Constitution. Given the

reversionary interest of Washington Wildlife in the right-of-way herein, the State of Minnesota should have sought to purchase the right-of-way for its recreational trail from the members of Washington Wildlife and not from the railroad.

Minnesota has a state statute which allows for purchase of abandoned railroad right-of-ways by the State for use as recreational trails. Minn. Stat. §84.029, subd. 2. Nevertheless, the statute itself requires that these right-of-ways indeed be "abandoned" prior to purchase, and does not specify who the purchase is to come from. A constitutional reading of the statute requires that upon abandonment, the state purchase from the adjoining landowners and not the railroad. Abandonment, again, triggers the reversionary interest of the adjoining landowners.[7]

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[7]See, Plaintiffs'-Respondents' Brief For Appeal Number 82-151, at pp. 1-2.

The Minnesota Supreme Court disagreed, holding that "the 'abandoned' railroad rights-of-way referred to in the Statute include those which have been abandoned only for railroad purposes". 329 N.W.2d at 548. To take the right-of-way for other purposes, however, is to intrude upon the constitutionally protected reversionary interests of the homeowners along the right-of-way. It renders Minnesota Statutes Section 82.029, subd. 2, unconstitutional, a needless result when the statute can be read, as Washington Wildlife would have it read, in a constitutional manner.

CONCLUSION

This appeal presents serious questions of federal and constitutional law, which directly impact upon both the functioning of the ICC pursuant to congressional authority and the rights of homeowners to be compensated for property taken from them by

the State. A reversal of the Minnesota Supreme Court by the United States Supreme Court is necessary to establish uniformity amongst the states in the application of federal congressional and Constitutional law on these issues.

Respectfully submitted,

BROEKER, HARTFELDT, HEDGES & GRANT

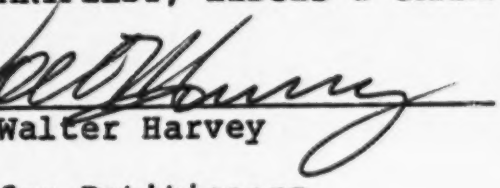
By 
Walter Harvey

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EXHIBIT A

STATE of Minnesota, by WASHINGTON WILDLIFE PRESERVATION, INC., et al., Appellants (82-150), Respondents (82-151),

v.

STATE of Minnesota and its Department of Natural Resources, et al., Respondents (82-150), Appellants (82-151).

Nos. 82-150, 82-151.

Supreme Court of Minnesota.

Jan. 14, 1983.

Syllabus by the Court

The change in use of a right-of-way from a railroad bed to a public recreational trail does not constitute an abandonment of that right-of-way for public travel.

Broeker, Hartfeldt, Hedges & Grant, Will Hartfeldt and Samuel D. Orbovich, Minneapolis, for State of Minnesota by Washington Wildlife Preservation, Inc., et al. 82-150.

Hubert H. Humphrey, III, Atty. Gen., C. Paul Faraci, Deputy Atty. Gen., A.W. Clapp, III, and Deborah J. Topp, Sp. Asst. Attys. Gen., Dept. of Natural Resources, St. Paul, for State of Minn. and its Dept. of Natural Resources, et al. 82-151.

Briggs & Morgan and Samuel H. Morgan, St. Paul, for Minnesota Parks Foundation.

Heard, considered and decided by the court en banc.

SCOTT, Justice.

Plaintiffs, members of Washington Wildlife Preservation, Inc., brought this action in response to the purchase of a railroad right-of-way by defendants State of Minnesota and its Department of Natural Resources from defendant Soo Line Railroad Company. Plaintiffs, Washington County landowners whose property adjoins the right-of-way, seek, *inter alia*, a declaration that they are the true owners of the right-of-way.

Plaintiffs moved for a partial summary judgment on their first cause of action, relating to their claim of ownership of the right-of-way. Defendants filed a cross-motion for summary judgment or for dismissal. The Washington County District Court ordered partial summary judgment, declaring that: (1) 13 deeds by the original landowners, plaintiffs' predecessors, conveyed a fee title to defendant Soo Line's predecessor; (2) the deed from one of the original grantors, Tracy Metcalf, plaintiff GNS Investors' predecessor, conveyed only a right-of-way easement to Soo Line's predecessor; (3) Soo Line acquired a prescriptive easement only, and not fee title, to a portion of plaintiff GNS Investors' land, for which the railroad had no deed; and (4) the court expressly declined to adjudicate the rights of plaintiffs Richard and Nancy Butter in the right-of-way because it was unable to determine their original grantor (the record discloses that the Butter property does not abut this right-of-way). Both plaintiffs and defendants appealed from the portions

of the order adverse to them. The trial court's order is a partial summary judgment, does not direct the entry of judgment, and contains no express determination that there is no reason to delay.[1]

The property in dispute is a strip of land in Washington County varying in width from 100 to 150 feet and extending 9.88 miles in length. The portions of the land in dispute were acquired by the St. Paul and St. Croix Railroad Company and the Minnesota, St. Croix and Wisconsin Railroad Company in 1884 and 1885. The right-of-way acquired by these railroads was transferred to defendant Soo Line.

The right-of-way was used for railroad purposes until October 1977. On January 23, 1980, the Interstate Commerce Commission issued a certificate permitting the Soo Line to abandon the portion of the line here in dispute. The certificate "conditioned [abandonment] on a public use in accordance with the plans of the Minnesota Department of Natural Resources." The order prohibited the Soo Line from selling the property for 180 days unless a binding agreement for the use of the property had been negotiated between the railroad and the DNR.

On August 22, 1980, Soo Line gave a quitclaim deed to the State of Minnesota for the land. The purchase price was $460,000. Of this amount the state paid $452,000 and the Minnesota Parks Foundation paid $8,000. Prior to the purchase of the land by the state, the plaintiffs had offered Soo Line $460,000.

The Minnesota Department of Natural Resources purchased the land for a recreational trail pursuant to Minn.Stat. § 84.029, subd. 2 (1980). Under this statute and Minn.Stat. § 85.015 (1980), the DNR has to date established 10 recreational trails on abandoned railroad rights-of-way, spending over $2,000,000 for construction and development of the trails.

Plaintiffs, landowners whose property abuts the right-of-way, claim to be the true owners of portions of the right-of-way. They formed Washington Wildlife, Inc., a nonprofit corporation, to insure that ownership of the abandoned right-of-way reverted to them and to protect natural resources intrinsic to the area. Following the conveyance of the right-of-way to the state, plaintiffs commenced this action. Plaintiffs' amended complaint asserts five "causes of action" which may be summarized as follows:

The first cause of action alleges that the individual plaintiffs hold all right, title and interest in the abandoned right-of-way by operation of law. The second cause of action alleges that Washington Wildlife, Inc., negotiated with Soo Line for purchase of the right-of-way and offered $460,000 for

1. Prior decisions of this court interpreting Minn.R.Civ.P. 54.02 clearly indicate that a partial summary judgment, such as was issued by the trial court in this case, is not an appealable order. *Financial Relations Board, Inc. v. Pawnee Corp.*, 308 Minn. 109, 240 N.W.2d 565 (1976); *Buchman Plumbing Co. v. Regents of University of Minnesota*, 293 Minn. 437, 196 N.W.2d 629 (1972). The purpose of the rule is to prevent piecemeal appeals and the usual unnecessary delay and expenditure of judicial and professional resources that such appeals entail. Since in this case our decision may very well be dispositive, we grant discretionary review as provided for in Minn.R.Civ.P. 105.

the property. It is alleged that Soo Line promised Washington Wildlife, Inc., a right of first refusal with respect to any conveyance of the right-of-way and that Soo Line breached this promise, making the conveyance to the state voidable. The third cause of action alleges that use of the right-of-way as a recreational trail available to random public use would destroy protectable natural resources in the area in violation of the Minnesota Environmental Rights Act. The fourth cause of action alleges that the DNR lacked the authority to purchase the property because the price paid exceeded the appraised value by more than 10 percent, and because only the plaintiffs were in a position to convey the property to the state. The fifth cause of action alleges, *inter alia*, that use of the right-of-way violates state law, is a use not authorized by the Metropolitan Council or Washington County, and constitutes a public and private nuisance damaging plaintiffs in the amount of $460,000. Plaintiffs seek various forms of injunctive and declaratory relief, as well as the damages mentioned above.

The majority of the plaintiffs' claims to ownership of portions of the right-of-way turn on the construction of 14 deeds executed in 1884 and 1885 from plaintiffs' predecessors in title to the Soo Line's predecessors in title, the St. Paul and St. Croix Railroad Company and the Minnesota, St. Croix and Wisconsin Railroad Company. Plaintiffs claim these deeds convey only a railroad right-of-way easement, and that upon abandonment of the right-of-way the underlying fee reverted to them free of the easement. Defendants claim the deeds convey absolute fee title, and deny that the right-of-way has been abandoned.

A portion of the right-of-way traverses property belonging to plaintiff GNS Investors. There is no deed or other document conveying a portion of this land to the railroad. Plaintiffs claim the railroad acquired only a prescriptive easement over the portion of GNS Investors' property for which there is no deed. Defendants claim that fee title was acquired by adverse possession.

As indicated above, the trial court found that 13 of the 14 deeds conveyed fee title to the railroads and one of the deeds conveyed only a right-of-way easement. The court also found that the railroad acquired only a prescriptive easement, and not fee title, to that portion of GNS Investors' land it occupied without a deed. The court held that there had been an abandonment of the right-of-way easement interests and that upon abandonment there was an automatic reversion to GNS Investors.

We address only those issues which we deem dispositive.

Defendants' major argument is that, even assuming the railroad acquired only an easement interest through the deeds and adverse possession, the right-of-way has never been abandoned for public travel and without such abandonment there is no extinction of the easement which would trigger plaintiffs' reversionary rights. The gist of their argument is that the right-of-way once carried trains moving people and goods, and that it now supports a path on which people move under their own power. It is argued that both are in the nature of public transportation.

In opposition, plaintiffs state their case as follows: The right-of-way was previously used for railroad purposes. Now it is used for recreational purposes totally unrelated to the use under which the right-of-way was obtained. That persons still travel over the right-of-way does not change the fact that its present contemplated use is for a purpose fundamentally different from the purpose for which it was acquired.

We agree with defendants that, assuming the railroad held only an easement interest, there has been no abandonment of the easement which would trigger plaintiffs' reversionary rights. Use of the right-of-way as a recreational trail is consistent with the purpose for which the easement was originally acquired, public travel, and it imposes no additional burden on the servient estates.

While defendants correctly assert that there has been no abandonment of the easement, they are incorrect in asserting that without such abandonment there is no need to divine from each deed the intent of the grantor and grantee. When an easement is by grant its extent depends entirely upon the construction of the terms of the grant. *Highway 7 Embers, Inc. v. Northwestern National Bank*, 256 N.W.2d 271 (Minn.1977). The process which creates the easement necessarily fixes its extent and therefore the extent of an easement created by conveyance is fixed by the terms of the conveyance. *Minneapolis Athletic Club v. Cohler*, 287 Minn. 254, 177 N.W.2d 786 (1970). Thus, in order to determine whether the easement has been abandoned, and whether the use of the right-of-way as a recreational trail is within the scope of the easement, it is necessary to consider the language of the deeds.

It is assumed that the deeds conveyed only an easement. Significantly, however, none of the deeds expressly limit the easement to railroad purposes, provide that the interest conveyed terminates if use for railroad purposes ceases, or provide that the easement would exist only for so long as the right-of-way was used for railroad purposes. While the grantors were undoubtedly aware that a railroad would be constructed on the land, none of the deeds limit the use to railroad purposes.

[1, 2] In determining that there has been no abandonment of the right-of-way, it is noted initially that railroad right-of-way easements are transferable, *Crolley v. Minneapolis & St. Louis Railway Company*, 30 Minn. 541, 16 N.W. 422 (1883), and that such rights-of-way were originally acquired and are held by railroads to serve a public purpose. In *Marthens v. B. & O. Railroad Company*, 289 S.E.2d 706 (W.Va.1982), the court said:

> Despite this fact, however, railroads are not viewed strictly as private corporations since they are publicly regulated common carriers. Essentially, a railroad is a highway dedicated to the public use. This dedication imports to the railroad the status of a quasi-public corporation. *Eckington & Soldier's Home R. Co. v. McDevitt*, 191 U.S. 103, 24 S.Ct. 36, 48

L.Ed. 112 (1903); *United States v. Trans-Missouri Freight Assoc.*, 166 U.S. 290, 17 S.Ct. 540, 41 L.Ed. 1007 (1897). As such, the rights and duties of a railroad are in most instances determined by constant consultation with the public interest.

289 S.E.2d at 711.

Similarly, in *Crolley v. Minneapolis & St. Louis Ry. Co.*, 30 Minn. 541, 16 N.W. 422 (1883), in holding that the conveyance of a railroad right-of-way acquired by condemnation to another railroad did not constitute an abandonment, the court said:

> Was the conveyance an abandonment of the use for which the land was taken, so that it reverted to the owner free of such use? In theory the land was taken, and the right to apply it to the public use proposed acquired, for the state. It is true, the title to the right thus acquired vested in the corporation, but it so vested in it only for the purpose of employing it in the public use. So far as taking and holding lands under the sovereign right of eminent domain is concerned, railroad corporations must be deemed agencies through which the state exercises that right, to subserve the public needs. When taken for railroads, the land is taken under authority of the state, to be applied under the same authority to a public use, to-wit, to a highway, public in a certain sense.

30 Minn. at 544, 16 N.W. at 424.

[3] It has long been held that the holder of an easement is not limited to the particular method of use in vogue when the easement was acquired, and that other methods of use in aid of the *general purpose* for which the easement was acquired are permissible. In *Haeussler v. Braun*, 314 N.W.2d 4 (Minn.1981), the court quoted with approval the following passage from *Cater v. Northwestern Telephone Exchange Co.*, 60 Minn. 539, 543, 63 N.W. 111, 112 (1895):

> If there is any one fact established in the history of society and of the law itself, it is that the mode of exercising [the public] easement is expansive, developing and growing as civilization advances. In the most primitive state of society the conception of a highway was merely a foot-path; in a slightly more advanced state it included the idea of a way for pack animals; and, next, a way for vehicles drawn by animals,—constituting, respectively, the "iter," the "actus," and the "via" of the Romans. And thus the methods of using public highways expanded with the growth of civilization, until today our urban highways are devoted to a variety of uses not known in former times, and never dreamed of by the owners of the soil when the public easement was acquired. Hence it has become settled law that the easement is not limited to the particular methods of use in vogue when the easement was acquired, but includes all new and improved methods, the utility and general convenience of which may afterwards be discovered and developed in aid of the general purpose for which highways are designed. And it is not material that these new and improved methods of use were not contemplated by the owner of the land when the easement was acquired, and are more onerous to him than those then in use.

Other courts have not limited railroad right-of-way easements strictly to railroad purposes. In *Bernards v. Link*, 199 Or. 579, 248 P.2d 341 (1952), the court held that rights under a railroad right-of-way easement were not abandoned by the conversion of the railroad line to a road for logging purposes. In *Faus v. City of Los Angeles*, 67 Cal.2d 350, 62 Cal.Rptr. 193, 431 P.2d 849 (1967), the court held that conversion of a right-of-way from streetcar service to motor vehicle service did not amount to an impermissible change in public use.

[4] The right-of-way in this case will be used by hikers, bikers, cross-country skiers and horseback riders. The right-of-way is still being used as a right-of-way for transportation even though abandoned as a railroad right-of-way. Recreational trail use of the land is compatible and consistent with its prior use as a rail line, and imposes no greater burden on the servient estates. The use is a public use, which is consistent with the purpose for which the easement was originally acquired. State and federal statutes encouraging the conversion of railroad rights-of-way to recreation trails also support our holding. See Minn.Stat. § 84.-029 (1980); 49 U.S.C.A. 10906 (West Supp. 1982).

Pollnow v. State Dept. of Natural Resources, 88 Wis.2d 350, 276 N.W.2d 738 (1979), relied on by plaintiffs, is not controlling. There the court held that use of a railroad right-of-way as a recreational trail constituted abandonment of the easement. The court also said:

> We make no holding as to the power of the Congress or the state Legislature to preserve the rights of the public in existing rail corridors for multiple public uses, including transportation, conservation or recreation. That question must be deferred to an appropriate case.

88 Wis.2d at 367, 276 N.W.2d at 746. At the time of the sale, Wisconsin did not have a law addressed to acquiring railroad rights-of-way, and Congress had not yet enacted the following:

> Offering abandoned rail properties for sale for public purposes
>
> When the Interstate Commerce Commission finds under section 10903 of this title that the present or future public convenience and necessity require or permit abandonment or discontinuance, the Commission shall find further whether the rail properties that are involved in the proposed abandonment or discontinuance are suitable for use for public purposes, including highways, other forms of mass transportation, conservation, energy production or transmission, or recreation. If the Commission finds that the rail properties proposed to be abandoned are suitable for public purposes, the properties may be sold, leased, exchanged, or otherwise disposed of only under conditions provided in the order of the Commission. The conditions may include a prohibition on any such disposal for a period of not more than 180 days after the effective date of the order, unless the

properties have first been offered, on reasonable terms, for sale for public purposes.

49 U.S.C.A. § 10906 (West Supp.1982). This law was in effect when the Interstate Commerce Commission authorized the Soo Line Railroad to discontinue service on the subject right-of-way. The abandonment for railroad purposes is conditioned on a public use in accordance with the plans of the Minnesota Department of Natural Resources. The ICC found that the properties to be abandoned were suitable for other public purposes and the railroad was ordered to devote 180 days to negotiating a binding agreement with the Department of Natural Resources for the use of the property. The situation here is very different from what confronted the *Pollnow* court.

[5] Two other issues raised by plaintiff landowners on the abandonment issue deserve brief comment. First, it is argued that the DNR lacks authority to acquire railroad rights-of-way for recreational trails unless such rights-of-way have been abandoned. Plaintiffs rely on Minn.Stat. § 84.029, subd. 2, which permits the DNR to acquire easements or other interests in land for trails "when railroad rights-of-way are abandoned." It is claimed that the DNR lacks authority to acquire the right-of-way unless it has in fact been abandoned.

There is no merit to that argument. The "abandoned" railroad rights-of-way referred to in the statute include those which have been abandoned only for railroad purposes.

[6] Similarly, there is no merit to the argument that abandonment of the right-of-way occurred on January 23, 1980, when the ICC issued the abandonment certificate. The issuance of the ICC certificate of abandonment does not necessarily indicate an intention to abandon. *See, e.g., Hennick v. Kansas City Southern Ry. Co.*, 364 Mo. 883, 269 S.W.2d 646 (1954). While the certificate permits abandonment for railroad purposes, it expressly contemplates continued use of the right-of-way for another public purpose. The easement was not abandoned for all purposes of public travel.

We therefore must reverse the trial court on this issue. We consider this holding dispositive of the matter before us; we therefore need not reach the other issues. The right-of-way has been purchased by the state. The state's use of the right-of-way as a recreational trail is within the scope of the interest it acquired. The right-of-way has not been abandoned; therefore, the adjoining landowners' rights, if any, to the property free of the easement have not yet matured.

Reversed in part and remanded.

EXHIBIT B

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF WASHINGTON

TENTH JUDICIAL DISTRICT

- - - - - - - - - - - - - - -

State of Minnesota by Washington Wildlife Preservation, Inc., and Charles Peterson, as its President, et al

File 50613
PARTIAL SUMMARY JUDGMENT

vs.

State of Minnesota and its Department of Natural Resources, et al

Defendants

- - - - - - - - - - - - - - -

The above-entitled matter came before the above named Court at Special Term on April 29, 1981 at the Washington County Courthouse, Stillwater, Minnesota

Will Hartfeldt, Esq and Becky A Comstock appeared on behalf of the Plaintiffs. Special Assistant Attorney Generals A W Clapp III and Donald J Paquette appeared on behalf of the Defendants.

The Court, being fully advised in the Premises, did on the 4th day of November make its order for Partial Summary Judgment on file herein.

NOW, THEREFORE, Pursuant to Said Order for Partial Summary Judgment it is hereby ordered:

1. All of the original grantors of Plaintiffs, Successors in Title, conveyed fee title to Defendant, Soo Line Railroad's Predecessor, of the right-of-way subject to dispute herein, pursuant to the respective Warranty Deeds, with the exception of Plaintiff, GNS Investors, whose original grantor, Tracy Metcalf, conveyed only an easement in said right-of-way which has been abandoned.

2. A Prescriptive easement, and not a fee title, was acquired by adverse possession of the right-of-way over the remaining portion of Plaintiff, GNS Investors' land, which is other than that noted above.

3. This partial summary judgment in no way adjudicates any of Plaintiffs, Richard and Nancy Butter's respective rights in said right-of-way.

DATED: November 5, 1981

William A Funa ri
Clerk of Courts

by/s/_____
Deputy

STATE OF MINNESOTA

COUNTY OF WASHINGTON

DISTRICT COURT

TENTH JUDICIAL DISTRICT

- - - - - - - - - - - - - - -

State of Minnesota by Washington Wildlife Preservation, Inc., and Charles Peterson, as its President, et al,

Plaintiffs,

vs.

State of Minnesota and its Department of Natural Resources, et al,

Defendants.

ORDER FOR PARTIAL SUMMARY JUDGMENT

File No. 50613

- - - - - - - - - - - - - - -

The above-entitled matter came on before the undersigned at Special Term on April 29, 1981, at the Washington County Courthouse, Stillwater, Minnesota.

Will Hartfeldt and Becky A. Comstock appeared on behalf of Plaintiffs. Special Assistant to the Attorney General, A. W. Clapp III and Donald J. Paquette appeared on behalf of Defendants.

At the hearing, Plaintiffs and Defendants were ordered to file briefs on Plaintiffs' First Cause of Action on the cross-motions for summary judgment. Upon motions by Plaintiffs for an Order granting a continuance to permit discovery and to compel discovery from Defendants, this Court stayed discovery until the filing of said briefs. All parties agree that as regards Plaintiffs' First Cause of Action there are no genuine issues of material fact and that a partial summary judgment in regard thereto is appropriate.

Motions to Amend the Complaint and Answer were granted, no objection having been made thereto. Remaining motions of Plaintiffs and Defendants were continued pending decision on Plaintiffs' First Cause of Action.

This matter having been submitted to the Court upon cross-motions for partial summary judgment, based upon all of the

records, files, memorandums of law and reply memorandums of law in regard to Plaintiffs' First Cause of Action, and proceedings herein, the Court now being fully advised makes the following:

ORDER

1. All of the original grantors of Plaintiffs, Successors in Title, conveyed fee title to Defendant, Soo Line Railroad's predecessor, of the right-of-way subject to dispute herein, pursuant to the respective Warranty Deeds, with the exception of Plaintiff, GNS Investors, whose original grantor, Tracy Metcalf, conveyed only an easement in said right-of-way, which has been abandoned.

2. A prescriptive easement, and not a fee title, was acquired by adverse possession of the right-of-way over the remaining portion of Plaintiff, GNS Investors' land, which is other than that noted above.

3. This partial summary judgment in no way adjudicates any of Plaintiffs, Richard and Nancy Butter's respective rights in said right-of-way.

The attached memorandum is made a part hereof.

Dated: November 4, 1981

/s/
Esther M. Tomljanovich
Judge of District Court
Tenth Judicial District

MEMORANDUM

On April 29, 1981, a hearing was held at Special Term before the undersigned pursuant to cross-motions for summary judgment. At said hearing, Plaintiffs and Defendants were ordered to file briefs regarding Plaintiffs' first cause of action. Plaintiffs' first cause of action alleged in their Complaint is that Defendant, Soo Line Railroad, did not have marketable title to the "right-of-way" when it conveyed the right-of-way by Quit Claim Deed to Defendant, the State of Minnesota.

Rule 56.03 of the Minnesota Rules of Civil Procedure sets forth two specific requirements which must be met before a summary judgment may be granted. First, the court must determine, on the basis of all the pleadings, depositions, answers to interrogatories and admissions on file together with the filed affidavits, that there is no genuine issue as to any

material fact. Secondly, the court must determine which party, if any, is entitled to judgment as a matter of law. The existence of a law question is no bar to an order granting summary judgment if there is no genuine issue of fact. Slezak v. Ousdigian, 260 Minn. 303, 110 N.W.2d 1 (1961).

The mere fact that all parties have moved for summary judgment does not mean that the court can find, without further consideration of the facts, that no genuine issue of material fact is presented. Slezak v. Ousdigian, Id. Such further consideration of the facts indicates that between 1884 and 1887 Defendant, Soo Line Railroad's predecessors in interest, St. Paul and St. Croix Railroad Company and St. Croix and Wisconsin Railroad Company, purchased pursuant to Warranty Deeds, property from Plaintiffs' predecessors for a railroad right-of-way. The Railroad has

no documentation of acquisition of a portion of the land of Plaintiff, GNS Investors, a member of Washington Wildlife and an individual Plaintiff in this lawsuit, either by deed or condemnation.

Plaintiff, Washington Wildlife, is a Minnesota non-profit corporation composed of residents and landowners whose property is traversed by the railroad right-of-way, the subject of this lawsuit. Plaintiffs are successors in title to the land which abuts the abandoned railroad right-of-way. Plaintiff, Washington Wildlife, was formed for the principal purpose of ensuring that the abandoned right-of-way reverts to the members of Washington Wildlife.

The Interstate Commerce Commission authorized and certified abandonment of the railroad line on January 23, 1980. After such certification, the Railroad conveyed by Quit Claim Deed said interest in the right-of-way. Said right-of-way is now a

state recreational trail.

In Count I of Plaintiffs' Complaint, it is alleged that:

> Plaintiffs Reid and those Plaintiffs subsequently listed in the caption hereto . . . hold all right, title and interest to the abandoned railroad right-of-way described herein by operation of law, each with respect to that portion which crosses their respective property.

However, it appears that Plaintiffs are only a minority of the landowners abutting the abandoned right-of-way. Plaintiffs claiming title to the right-of-way abutting their land bring this action against Defendant, Soo Line Railroad, to quiet title to the property, pursuant to the Uniform Declaratory Judgments Act, Minnesota Statutes §555.01, et seq.

Minnesota Statutes §555.11 provides:

> When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings.

Pursuant to Minnesota Statutes §555.13, the

word "person" means any person, unincorporated association or other corporation of any character. Any abutting landowners not having been made a party hereto or a party of any organization made a party hereto, i.e., Washington Wildlife Preservation, Inc., this Court does not have jurisdiction to determine any such landowners' respective rights in any matter having to do with, or affecting said, non-parties' rights. Frisk v. Board of Education of the City of Duluth, 246 Minn. 356, 75 N.W.2d 504 (1956). Thus, the only land that this Court has jurisdiction to determine rights in is that land which abuts Plaintiffs' property.

Following are the Plaintiffs listed in the Complaint whose land abuts Defendant, Soo Line Railroad's abandoned right-of-way:

Original Grantor	Plaintiff, Successor in Title
Meinke	Edward and Dorothy Reid and John Kokkeler

Coles	Betty Thorson and Paul Schultz
Neuman	Kenneth Wharton, Jr.
Dougherty	Victor Witzell and Richard Firkus
Gagne	Richard Firkus
Wildwood Park Assoc.	Sidney Jakubowski and Patrick Sweeney
Taft and Fairbanks	Marlin Eiklenborg, Charles Peterson and Verlin Behm
Jenks and Coles	Agnes and James Lane
Thelander	Agnes and James Lane, Johnson Associates and William and Thomas Johnson
Crowley	Johnson Associates and William and Thomas Johnson
Macey	Bisvaldis Vanagus, William Olson, Jr., and Marlene and Ronald Tatro
Stenborg	William Olson, Jr., and Bruce Rollie
Volker	Kenneth Berwald and Berwald Investment
Metcalf	GNS Investors

This Court is unable to determine the

original grantor of Plaintiffs, Richard and Nancy Butter and thus, is not able to determine any of said Plaintiffs' respective rights.

Copies of these original handwritten deeds on file in the Recorder's Office, and typed versions to facilitate the reading of the original handwritten deeds, have been provided to this Court. All fourteen of said deeds are labeled Warranty Deeds. With the exception of the Warranty Deed dated March 2, 1885, from Plaintiff, GNS Investors' original grantor, Metcalf, and with a slight deviation in language occurring in the Warranty Deed from the original grantor, Wildwood Association, all of the Warranty Deeds contain the following language:

> Said party of the first part for and in consideration of . . . Dollars, paid by the said party of the second part, . . . have granted, Bargained, Sold, Remised, Released, Aliened and Confirmed, and by these presents due Grant, Bargain, Sell, Remise, Release, Alien and Confirm unto the said party

of the second part and to its Successors and Assigns forever, (emphasis added) All that certain Tract, Piece or Parcel of LAND situate lying and being in the County of Washington and State of Minnesota, and described as follows, to-wit: A strip, belt or piece of land . . ., extending across the following described tract of land, . . ., through the centre of which said strip, belt or piece of land, the centre line of the Railroad of said Company is now located, so as to leave . . . in wit, on each side of said centre line.

TOGETHER with all and singular, the Hereditaments and Appurtenances, thereunto belonging, or in anywise appertaining; and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and all of the estate, right, title, interest, claim or demand whatsoever of the said parties of the first part (emphasis added), either in law or equity of, in and to the above bargained premises, with the Hereditaments and Appurtenances.

TO HAVE AND TO HOLD the said premises as above described, with the Appurtenances, unto the said party of the second part, and to its Successors and Assigns forever (emphasis added).

AND THE SAID Grantor, for himself and his Heirs, Executors, Administrators and Assigns doth Covenant, Grant, Bargain and Agree to and with the said party of the second part, and its Successors and Assigns, that at the time of the ensealing and delivery of

> these presents he is well seized of the premises above described, as of a good, sure, perfect, absolute and indefeasible estate of inheritance in the Law, in fee simple, and that the same are FREE AND CLEAR FROM ALL ENCUMBRANCES WHATEVER, and that the above bargained premises in the quiet and peaceful possession of the said party of the second part, its Successors and Assigns, against all and every person or persons lawfully claiming or to claim the whole or any part thereof, he will FOREVER WARRANT AND DEFEND.

The determination of whether or not the Railroad Company herein acquired a fee title or only an easement which would revert upon abandonment, in the land conveyed by the above respective Warranty Deeds, is to be made based upon the intent of the parties, which is to be ascertained from an examination of the entire instrument and not from any particular clause or provision thereof taken by itself, i.e., the respective Warranty Deeds. Minneapolis Athletic Club v. Cohler, 287 Minn. 254, 177 N.W.2d 786 (1970); Chicago Great Western R.Co. v.

Zahner, 145 Minn. 312, 177 N.W. 350 (1920); Norton v. Duluth Transfer Ry. Co., 129 Minn. 126, 151 N.W. 907 (1915); Flaten v. City of Moorhead, 51 Minn. 518, 53 N.W. 807 (1892); Bode v. Flobert Industries, Inc., 197 Neb. 488, 249 N.W.2d 750 (1977). Having examined the respective Warranty Deeds, this Court is of the opinion that the intent of all the original grantors, with the exception of Grantor Metcalf, was to convey a fee title and not just an easement.

The respective Warranty Deeds contain language indicative of an intention that an absolute and unqualified title passed to the grantee, i.e., the significant word generally found in deeds of real property "forever", follows the clause "to have and to hold the same". See, Johnson v. Burlington Northern Inc., 294 N.W.2d 63 (Iowa 1980); Turner v. Unknown Claimants of Section 4, Etc., 207 N.W.2d 544 (Iowa

1973); Norton v. Duluth Transfer Ry. Co., 129 Minn. 126, 15 N.W. 907 (1915). In addition, there is no language in the respective deeds in regard to a conveyance of only "a right-of-way", nor are any of the conveyances made subject to any qualification or specified purpose. See, Magnolia Petroleum v. Thompson, 106 F.2d 217 (8th Cir. 1939); Johnson v. Burlington Northern, Inc., 294 N.W.2d 63 (Iowa 1980); Minneapolis Athletic Club v. Cohler, 287 Minn. 254, 177 N.W.2d 786 (1970); Chicago Great Western Ry. Co. v. Zahner, 145 Minn. 312, 177 N.W. 350 (1920); Norton v. Duluth Transfer Ry. Co., 129 Minn. 126, 151 N.W. 907 (1915); Chambers v. Great Northern Power Co., 100 Minn. 214, 110 N.W. 1128 (1907); Flaten v. City of Moorhead, 51 Minn. 518, 53 N.W. 807 (1892); Bode v. Flobert Industries, Inc., 197 Neb. 488, 249 N.W.2d 750 (1977); Blakely v. Chicago, Kand N.R. Co., 46 Neb. 272, 64 N.W. 972 (1895);

Pollnow v. Wisconsin Department of Natural Resources, 88 Wis.2d 350, 276 N.W.2d 738 (1979).

Although, the above Warranty Deeds do contain the following language: "extending across the following described tract of land, . . . through the centre of which said strip, belt or piece of land, the centre line of the Railroad of said Company is now located", said language does not contain any additional and necessary limiting language such as "for a right-of-way". See, Magnolia Petroleum v. Thompson, Supra; Turner v. Unknown Claimants of Section 4, Etc., 207 N.W.2d 544 (Iowa 1973). The Warranty Deed dated June 28, 1884, from Margaret Coles and R. M. Coles, contains the above-cited language, but in addition, at the bottom of the deed, i.e., the acknowledgment, the following language appears:

> BE IT REMEMBERED, that on this 20th day of June A.D., 1884, personally

> came before me the above named Margaret Coles and R. M. Coles, her husband, to me known to be the persons described in and who executed the above deed, and duly and generally acknowledged the same to be their free act and deed for the uses and purposes therein named. (emphasis added)

However, no specific uses and/or purposes are named in the above-noted deed. Furthermore, the purpose of the acknowledgment is to make the deed competent evidence without proof of execution and to facilitate recording. See, Bennette v. Knowles, 66 Minn. 4, 68 N.W. 111 (1896).

Such specific uses and purposes are contained in the Warranty Deed dated March 2, 1885, from Tracy M. Metcalf, wherein an acknowledgment similar to the Warranty Deed dated June 28, 1884, from Coles appears at the bottom of said deed. The Warranty Deed dated March 2, 1885, from Plaintiff, GNS Investors' original grantor, Tracy Metcalf, contains the following language:

That the said party of the first part for and in consideration of One Dollar (emphasis added) and other good and valuable considerations paid by the said party of the second part . . . hath granted, bargained, sold, remised, released, aliened and confirmed and by these presents doth grant, bargain, sell, remise, release, alien and confirm unto the said parties of the second part and to its successors and assigns forever . . . .

Also for depot grounds, (emphasis added) a strip of land four hundred feet in length and twenty five (25) feet width lying immediately adjacent to and parellel with (emphasis added) and bounding Northwesterly on the premises above described . . . .

In and by its acceptance of the foregoing deed, the said Minnesota, St. Croix and Wisconsin Railroad Company, being the successor of the St. Paul and St. Croix Railroad Company, has agreed to establish (emphasis added) between station stakes on its railroad numbered four hundred forty-nine (449) and four hundred fifty-three (453) respectively a suitable station, building and platform for the passenger business to be transacted at "Four Lakes" station, thereon established and to build a side track thereat, to accommodate not less than three cars and to stop at such station all its local trains between May 1 and October 1 and each year for the period of five years next ensuing upon the opening of its railraod for business and that any local train shall stock at such station between October 1 and May 1,

next ensuing during said period of five years when signaled to stop for the purpose of taking on not less than one paying passenger.

This deed is now executed pursuant of contract dated May 26, 1884, (emphasis added) executed by said grantor, and the said St. Paul and St. Croix Railroad Company, the predecessor of the above named grantee - said Agreements on the part of the grantee herein were made in consideration of the donation by said grantor to said grantee of the right-of-way and depot grounds above-described, (emphasis added) and in order to stimulate, foster and encourage the development of freight and passenger traffic at said Four Lakes Station and it was mutually agreed that in case the revenue from said station should be found insufficient to pay the expense of maintaining the same at the expiration of the five years above limited, then and in that case, said parties should be bound to maintain a platform and mailing room at such station and operate the same as a flag station only and not otherwise. (emphasis added)

The contract between Tracy Metcalf, Plaintiff, GNS Investors' original grantor and the St. Paul and St. Croix Railroad Company, Defendant Soo Line Railroad's predecessor, dated May 26, 1884, specifically referred to above, states in

pertinent part:

> Said first party further covenants and agrees that within sixty (60) days after the completion of the railroad of said second party upon, over and across the above described premises upon the line now surveyed, staked out and located by said second party, he will, at the expense of said second party, execute, acknowledge and deliver to said second party, a good and sufficient warranty deed of the right-of-way of said second party across said premises. (emphasis added) . . . Said deed shall contain full covenants of warranty, seizin, release of dower and that said premises then are free from all encumbrances, and shall be upon condition that said second party shall fulfill its agreements herein contained. (emphasis added)
>
> In consideration of the donation to-wit by said first party of the right-of-way (emphasis added) of the St. Paul and St. Croix Railroad above mentioned, said second party for its part doth hereby Covenant and agree with said first party to establish upon that portion of the right-of-way (emphasis added) so as aforesaid donated, . . . , a suitable depot station building and platform for the passenger business to be thereat transacted . . . .
>
> This agreement is now made between the parties hereto for the purpose of stimulating business in the transportation of freight and passenger to and from said "Four Lakes" station and said second party

now establishes said station for the purpose of fostering and encouraging said business, until it shall pay the expense of maintaining said station, in consideration of the donation to it by said first party of said right-of-way above described through his premises . . . . (emphasis added)

It is therefore agreed, that in the case the revenue from said station shall be found insufficient to pay the expense of maintaining the same, at the expiration of said term of five years above limited, and if said second party shall thereso elect, there and in that case, said second party shall not be longer bound to maintain the same, except as a flag station for local trains, but shall maintain a platform and mailing room. (emphasis added)

. . . .

The said first party shall have the right to string, at his own expense, a telephone wire on the telegraph poles located on the right-of-way of said second party (emphasis added) . . . .

Based upon the same above-stated reasons supporting the position that the other Warranty Deeds conveyed a fee title, it is the opinion of this Court that Plaintiff, GNS Investors' original grantor, Metcalf, did not convey a fee simple title. Not only does said Warranty Deed contain

specific purposes for the use of the land conveyed, but it also contains the term "right-of-way". Magnolia Petroleum Co. v. Thompson, Supra; Johnson v. Burlington Northern, Inc., Supra; Turner v. Unknown Claimants of Section 4, Etc., Supra; Minneapolis Athletic Club v. Cohler, Supra; Chicago Great Western R. Co. v. Zahner, Supra; Flaten v. City of Moorhead, Supra; Bode v. Flobert Industries, Inc., Supra; Blakely v. Chicago, K. & N. Ry. Co., Supra. Furthermore, although it is often difficult to ascertain the intent of the grantor, and exhaustive study could, no doubt, uncover factually identical cases with opposite results, the above Warranty Deed does not contain the common indicia for creating a fee simple determinable, whether it be a condition precedent or condition subsequent, i.e., "provided that", "upon condition that", or upon breach of the condition the grantor "may enter and

terminate the estate", or "until", "so long as", or "during", respectively. Consolidated School District No. 16 v. Walter, 243 Minn. 159, 66 N.W.2d 881 (1954); Farnham v. Thompson, 34 Minn. 330, 26 N.W. 9 (1885).

Although, the Contract to Convey, dated May 26, 1884, between Tracy Metcalf and the St. Paul and St. Croix Railroad Company, does contain the words "upon condition that", such words do not necessarily create a condition subsequent, for there are other words in the deed and agreement qualifying them, showing that such words were not used in their technical sense. See, Farnham v. Thompson, Id.

> Whatever may have been the earlier doctrine, it is now thoroughly settled that technical rules of construction are not favored, and must not be applied so as to defeat the intention. In modern times they have given way to the more sensible rule, which is, in all cases, to ascertain and give effect to the intention of the parties as gathered from the entire instrument. Witt v. St. Paul and N. P. Ry. Co., 38 Minn. 122, (35 N.W.

> Rep. 862); Grueber v. Lindenmeier, 42 Minn. 99, (43 N.W. Rep. 964). It is an important rule of construction, applicable to all written instruments, that every word and every clause shall, so far as possible, be given some force and meaning; and that in case, construing the hole instrument one way, meaning is given to every word and clause, while construing it another way some portion of the language used is rendered meaningless, the construction which gives force and meaning to all the language used is, as a rule to prevail. (emphasis added) This is upon the presumption that the party making the instrument did not use any language except what was necessary to make it speak the intention of the parties thereto.

Flaten v. City of Moorhead, 51 Minn. 519, 521, 53 N.W. 807, 808 (1892).

The qualifying words contained in the above Warranty Deed are: (1) "right-of-way"; (2) "In and by its acceptance of the foregoing deed, the said Minnesota, St. Croix and Wisconsin Railroad Company, . . ., has agreed to establish . . . a suitable station"; (3) "for depot grounds"; (4) "in consideration of One Dollar". Accordingly, taking into consideration the rule against forfeiture

and the applicable case law, and construing the entire instrument as a whole, it is the opinion of this Court that only an easement was conveyed by Tracy Metcalf. See, Eckington and S. H. Ry. Co., v. McDevitt, 191 U.S. 103, 24 Sup. Ct. 36, 48 L.Ed. 112 (1903); Grimes v. Minneapolis, St. P., R. & D. Electric Traction Co., 133 Minn. 442, 158 N.W. 719 (1916); Hamel v. Minneapolis, St. Paul & L. Ste. M. Ry. Co., 97 Minn. 334, 107 N.W. 139 (1906); George v. Pracheil, 92 Neb. 81, 137 N.W. 880 (1912).

By such a construction of the conveyance, this Court is aware of the twofold signification of the term "right-of-way", i.e., a right belonging to a party, a right of passage over any tract; or a strip of land which railroad companies take upon which to construct their roadbeds. See, Joy v. St. Louis, 138 U.S. 1, 11 S. Ct. 243, 34 L.Ed. 843 (1890); Bosell v. Rannestad, 226 Minn. 413, 33

N.W.2d 40 (1948). Notably a portion of the described premises was for the purpose of having a railroad bed constructed thereon. However, such a signification is still consistent with only an easement having been conveyed, in light of the other qualifying language. See, Echington and S. H. Ry. Co. v. McDevitt, Supra.

Having found Plaintiff GNS Investors' original grantor's Warranty Deed to convey only an easement, and not a conveyance of the land itself, Defendants argue that such interest is barred by Minnesota Statutes §541.023, the Minnesota Marketable Title Acts, i.e., the forty year time period set by said statute has passed without Plaintiffs or its predecessor in title filing the required notice. However, the owner of the servient estate always retains title to the land burdened by the easement. Minneapolis Athletic Club v. Cohler, 287 Minn. 254, 177 N.W.2d 786 (1970); Romans v.

Nadler, 217 Minn. 174, 14 N.W.2d 482 (1944). It appears that under Minnesota Statutes §541.023, it is an easement holder who must file to protect his future interest in the easement or risk extinguishment of that right, as the servient estate owner never relinquished title to the property. See, Township of Sterling v. Griffith, 309 Minn. 230, 244 N.W.2d 129 (1976); Caroga Realty v. Tapper, 274 Minn. 164, 163, N.W.2d 215 (1966); United Parking Stations v. Calvary Temple, 257 Minn. 273, 101 N.W.2d 208 (1960). Accord, Johnson v. Burlington Northern, Inc., 294 N.W.2d 63 (Iowa 1980).

Thus, upon abandonment of the right-of-way subject to dispute herein, Plaintiff GNS Investors' interest would automatically revert. Chicago Great Western R. Co. v. Zahrer, Supra; Norton v. Duluth Transfer Ry. Co., Supra. In this regard, Defendants argue that the use of

the above land for a public recreation trail does not constitute an abandonment of defendant, Soo Line Railroad's easement and that such easement could be transferred to the State for a recreational trail.

On January 23, 1980, the Interstate Commerce Commission, pursuant to Title 49, U.S.C. Section 10906, officially certified Defendant, Soo Line Railroad's abandonment of the land for railroad purposes. Title 49, U.S.C. Section 10906 specifically recognizes that railroad right-of-ways, such as Defendant, Soo Line Railroad has over Plaintiff, GNS Investors' land, have alternative public uses for travel and that one of these is recreational. In recognition of this is Minnesota Statute §84.029, Subd. 2, which provides:

> The commissioner (of natural resources) may acquire, by gift, purchase or lease, easements or other interests in land for trails, and recreational uses related to trails, where necessary to complete trails established primarily in state forests, state parks, or other public

> land under the jurisdiction of the commissioner, when railroad right-of-ways are abandoned . . . .

In Minneapolis Athletic Club v. Cohler, 287 Minn. 254, 258, 177 N.W.2d 786, 789 (1970), the Minnesota Supreme Court stated therein:

> An easement is best defined as an interest in land in the possession of another which entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists. Restatement, Property section 450. Every easement is a particular easement privileging the owner thereof to make particular uses of a servient tenement. The sum total of these particular privileges of use makes up the extent of the easement. To say that an easement has been created is but to say that certain privileges of use of land in the possession of one other than the one having the privilege have been created. The process which creates an easement necessarily fixes its extent and therefore the extent of the easement created by a conveyance is fixed by the terms of the conveyance. (emphasis added) Restatement, Property section 482.

Thus, there can be no doubt that Defendant, Soo Line Railroad abandoned its right-of-way, i.e., easement interest, in Plaintiff, GNS Investors' land. The

language used in the Warranty Deed dated March 2, 1885, is not ambiguous as to the uses provided to Defendant, Soo Line Railroad's predecessor. Furthermore, it is well settled that the extent of an easement should not be enlarged by legal construction beyond the objects originally contemplated or expressly agreed upon by the parties. Minneapolis Athletic Club v. Cohler, Id.; Thompson v. Germania Life Ins. Co., 97 Minn. 89, 106 N.W. 102 (1906); Kretz v. Fireproof Storage Co., 127 Minn. 304, 149 N.W. 648 (1914).

Accordingly, it is the opinion of this Court that Defendant, Soo Line Railroad, did abandon its right-of-way interest in Plaintiff GNS Investors' land. See, Chicago Great Western R. Co. v. Zahner, Supra; Norton v. Duluth Transfer Ry. Co., Supra; Chambers v. Great Northern Power Co., Supra. Accord, Pollnow v. Wisconsin Department of Natural Resources, Supra.

The last legal issue presented to this Court pursuant to the cross-motions for summary judgment is whether or not a railroad acquires by adverse possession, a fee title or a prescriptive easement in any land that its tracks traverse. In any action to determine adverse claims, the plaintiff must establish by clear and convincing evidence the existence of the elements required to obtain title by adverse possession. SSM Inv. v. Siemers, 291 N.W.2d 383 (Minn. 1980). In regard thereto, the parties before this Court agree that the records of Defendant, Soo Line Railroad contain no documents, including a Bond for Deed, Warranty Deed or otherwise, conveying a portion of Plaintiff GNS Investors' property to the Railroad's predecessor for its right-of-way and thus, any interest acquired in regards thereto was by adverse possession.

The majority rule in this country

holds that a railroad company acquires, by prescription or adverse possession, an easement in land which it traverses. See cases collected at 127 A.L.R. 517. Pollnow v. Wisconsin State Department of Natural Resources, 88 Wis.2d 350, 276 N.W.2d 738 (1979). The principal argument advanced in support of this view is that the nature of a railroad's use requires no more than an easement in the right-of-way and, therefore, does not amount to a use or occupancy adverse to the claim of another to the fee. Another reason given to substantiate this rule is that the interest acquired by prescription or adverse possession should extend only so far as the interest that might be acquired by condemnation. See, Pollnow v. Wisconsin State Department of Natural Resources, Id.

The minority view in this country is that a railroad company can acquire title in fee simple absolute by adverse

possession of the land it traverses. The reasoning behind the minority view being that the ancient policy of promoting certainty in real estate titles and discouraging obscure and tenuous future interest in land is thereby promoted. Norfolk v. Western Railway Company v. Bremco Mills, Inc., 288 N.E.2d 868 (Court of Common Pleas of Ohio, 1971); Pollnow v. Wisconsin State Department of Natural Resources, Supra.

The only existing cases in Minnesota dealing with the ability of a railroad company to acquire fee title by adverse possession of a right-of-way involve the railroad company acquiring title by adverse possession against public land. St. Paul and Duluth R. Co. v. City of Duluth, 73 Minn. 270, 76 N.W. 35 (1898); City of St. Paul v. Chicago Milwaukee and St. Paul Ry. Co. 45 Minn. 387, 48 N.W. 17 (1891), aff'd on rehearing, 63 Minn. 330, 65 N.W. 649

(1896), modified on second rehearing, 63 Minn. 330, 68 N.W. 458 (1896); St. Paul and D.R. Co. v. Village of Hinckley, 53 Minn. 398, 55 N.W. 560 (1893); Village of Wayzata v. Great Northern Ry. Co., 50 Minn. 438, 52 N.W. 913 (1892).

Notwithstanding that such a result, i.e., adverse possession of public land, is now expressly precluded by statute; See, Minnesota Statutes §§541.01 and 541.02; City of Hastings v. Gillitt, 85 Minn. 329, 88 N.W. 987 (1902), the Minnesota case of City of St. Paul v. Chicago, Milwaukee and St. Paul Ry. Co., Supra, has been specifically recognized to stand for the proposition that a railroad company can acquire fee simple title to land by adverse possession. Michigan C.R. Co. v. Garfield Petroleum Corp., 292 Mich. 373, 290 N.W. 833 (1940) (North, J., dissenting).

However, in Chambers v. Great Northern Power Co., 100 Minn. 214, 219, 110 N.W.

1128, 1130 (1907), the Minnesota Supreme Court therein stated:

> No reason occurs to us why any distinction should be made in the nature of the title granted by the state of its own lands and the title to be acquired from private owners. (emphasis added) In both cases, the lands were required for the purpose of constructing and operating a railroad thereon, and in the absence of express provision to the contrary would revert to the owner when no longer used for the purposes acquired.

"Railroad property, whether acquired by purchase or condemnation, is held for a specific public use; but so far as the right of property is concerned, it is private property and cannot be taken unless done so within the structure of the constitution." Bolin Lumber Co. v. Chicago and Northern Western Ry. Co., 270 Minn. 516, 522, 134 N.W.2d 312, 317 (1965). Also See, Minnesota Statutes §§300.03, .04 and .045. Pursuant to Minnesota Statutes, Constitution Article XIII, Section 4:

> Land may be taken for public way and for the purpose of granting to any corporation the franchise of way for

public use. In all cases, however, a fair and equitable compensation shall be paid for land and for the damages arising from taking it.

Furthermore, there is explicit case law in Minnesota, as noted previously herein, that a "right-of-way" is an easement only and that title to the land under such circumstances does not pass. Minneapolis Club v. Cohler, 287 Minn. 254, 177 N.W.2d 786 (1970). "In its strict meaning, a right-of-way means the right to pass over another's land. It is only an easement, and the grantee acquires only the right to a reasonable and usual enjoyment thereof." Id., at 257, 789. Thus, this Court is not inclined to believe that the minority view has been adopted in Minnesota, as is stated in Michigan C.R. Co. v. Garfield Petroleum Corp., Supra.

In addition, in Chicago Great Western R. Co. v. Zahner, Supra, the Minnesota Supreme Court held that the plaintiff railroad company was entitled to exclusive

possession of its right-of-way and that any possession of the private property owner was without right. Having characterized a railroad easement as giving the railroad exclusive possession, it is difficult to say that the railroad's occupation and use of the right-of-way has the "hostility and adversity" towards the private property owner as is mandated by the concept of adverse possession, notwithstanding the fact that said railroad's possession has been characterized as private property or as being hostile or adverse to the public. Chicago Great Western R. Co v. Zahner, Supra; City of St. Paul v. Chicago, Milwaukee and St. Paul Ry. Co., Supra.

In Galveston, H. and S.A. Ry. Co. v. McIver, 245 S.W. 463 (Court of Civil Appeals of Texas, 1922), and quoted with approval in Pollnow v. Wisconsin State Department of Natural Resources, Supra, the court concluded that the railroad could not

hold a fee title by adverse possession:

> ". . . the railroad company never had any other than a possession for railroad purposes, the mere fencing of its right-of-way not adding anything to the character of its use and occupancy, nor did that act affect McIver with notice that it was thereafter holding the land adversely for all purposes . . ." (emphasis added).

Dated: November 4, 1981

/s/
Esther M. Tomljanovich
Judge of District Court
Tenth Judicial District